Gerry Homes d/b/a Heritage Park Health Care Center *and* International Brotherhood of Teamsters Local Union No. 649, now known as Local Union No. 264. Case 3–CA–19149

September 26, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 27, 1996, Administrative Law Judge Jessie Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified,[2] and to adopt the remedy[3] and recommended Order as modified and set forth in full below.[4]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In fn. 3 of his decision, the judge stated that Manager Clark had resigned her position as of the hearing. The record indicates that it was Manager Larter who had resigned. We correct this error which does not affect our decision.

[2] We have modified the judge's conclusions of law to more accurately reflect the facts and attendant legal obligations. The following replaces pars. 6 and 7 of the judge's conclusions of law and renumbers the current par. 8 to par. 9:

> ''6. At all times material, and since January 1, 1995, the Respondent has been a successor employer at the Heritage Park facility, within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).
>
> ''7. On January 5, 1995, the Union demanded recognition from the Respondent as the exclusive representative of separate LPN and Service employee units at the Heritage Park facility. At all relevant times the Union has been, and is now, the exclusive bargaining representative of all the employees in the appropriate units set forth above, for the purpose of collective bargaining within the meaning of Sec. 9(a) of the Act.
>
> ''8. On January 11, 1995, the Respondent refused to recognize the Union as to both bargaining units. By failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the units found appropriate above, the Respondent violated Sec. 8(a)(5) and (1) of the Act.''

[3] There was no allegation in the complaint, litigation at the hearing, or finding by the judge as to the initial terms of employment set by the Respondent. Therefore, it is not appropriate to make any finding concerning these issues. Accordingly, we do not adopt the judge's discussion concerning the terms which Respondent must maintain until it meets its obligation to bargain.

[4] We have modified the recommended Order to include the descriptions of the bargaining units and to comport with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Gerry Homes d/b/a Heritage Park Health Care Center, Jamestown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union in good faith as the exclusive bargaining representative of the employees in the following appropriate LPN unit:

> All full-time and regular part-time licensed practical nurses employed by the Respondent at its Heritage Park facility located at 150 Prather Avenue, Jamestown, New York, excluding all office clerical employees, professional employees, registered nurses, service and maintenance employees, housekeeping aides, laundry aides, dietary employees, nursing assistants, social workers, activities director, dietitian, director of social work, in-service director and all guards and supervisors as defined in the Act.

(b) Failing and refusing to recognize and bargain with the Union in good faith as the exclusive bargaining representative of the employees in the following appropriate Service unit:

> All full-time and regular part-time service employees employed by the Respondent at its 150 Prather Avenue, Jamestown, New York location, including nursing assistants and physical therapy and rehab aides; excluding registered nurses, licensed practical nurses, dietary technicians, accredited records technicians, social workers, activities director, dietitian, director of social work, in-service director, office clerical employees, and other professional or technical employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the LPN unit and Service unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements.

(b) Within 14 days after service by the Region, post at its Heritage Park Health Care Center facility in Jamestown, New York, copies of the attached notice

marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with the Union in good faith as the exclusive bargaining representative of our employees in the following appropriate LPN unit:

All full-time and regular part-time licensed practical nurses employed by us at our Heritage Park facility located at 150 Prather Avenue, Jamestown, New York, excluding all office clerical employees, professional employees, registered nurses, service and maintenance employees, housekeeping aides, laundry aides, dietary employees, nursing assistants, social workers, activities director, dietitian, director of social work, in-service director and all guards and supervisors as defined in the Act.

WE WILL NOT refuse to recognize and bargain collectively with the Union in good faith as the exclusive representative of our employees in the following appropriate Service unit:

All full-time and regular part-time service employees employed by us at our 150 Prather Avenue, Jamestown, New York location, including nursing assistants and physical therapy and rehab aides; excluding registered nurses, licensed practical nurses, dietary technicians, accredited records technicians, social workers, activities director, dietitian, director of social work, in-service director, office clerical employees, and other professional or technical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate LPN Unit and the appropriate Service Unit concerning the terms and conditions of employment and, if an understanding is reached, embody the understanding in signed agreements.

GERRY HOMES D/B/A HERITAGE PARK
HEALTH CARE CENTER

Michael Cooperman, Esq., for the General Counsel.
Michael Lowenbaum, Esq. and *G. David Porter, Esq. (Sonnenschein, Nath & Rosenthal)*, for the Respondents.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge dated February 8, 1995, by the International Brotherhood of Teamsters Local Union No. 649, now known as Local Union No. 264[1] (the Union) against Gerry Homes d/b/a Heritage Park Health Care Center (the Respondent or Gerry Homes), a complaint and an amended complaint and notices of hearing were issued on March 29 and April 17, 1996, respectively, alleging that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Respondent's employees in a unit of licensed practical nurses (LPN unit), and a unit of service employees (Service unit).

[1] The parties stipulated at the hearing that Local Union No. 264 is a successor to any bargaining rights owing to Teamsters Local Union No. 649 as a result of a merger of Local 649

By answer timely filed the Resoondent denied the material alienations in the complaint.

A hearing was held before me on May 29 and 30, 1996, in Buffalo, New York. Subsequent to the close of the hearing, the General Counsel filed a brief and the Respondent a brief and proposed finding of fact and conclusions of law.

Upon the entire record and the briefs of the parties, and upon my observation witnesses, l make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, is and has been a New York not-for-profit corporation, with an office and place of business in Gerry, New York, and a facility in Jamestown, New York, known as the Heritage Park Health Care Center (Heritage Park), engaged in the operation of a nursing home. Annually, the Respondent in the conduct of its business operation's derives gross revenues in excess of $100,000 and purchased and received goods and services in excess of $50,000 directly from points outside the State of New York. The amended complaint alleges the Respondent admits and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Respondent had been a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters Local Union No. 649, now known as Local Union No. 264, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Prior to January 1, 1995, the Respondent had operated a nursing home called Heritage Village Health Care Center (Heritage Village) and had also owned a housing complex for retirees called Heritage Retirement Campus. The Respondent had unsuccessfully attempted to expand its nursing home business for several years until the opportunity arose for it to acquire two facilities, Fenton Park Nursing Home (Fenton Park) and Greenhurst Health Care Center (Greenhurst) on January 1, 1995.[2] At the time of the Respondent's acquisition of these facilities, they were being operated by a receiver appointed by the United States Bankruptcy Court pursuant to a petition filed under Chapter 11 of the Bankruptcy Code. The facilities were owned by Anthony Luizzo and were located in Jamestown, New York, approximately 6 miles from Gerry, New York, where Heritage Village is located.

Since its certification in 1980, the Union, through collective-bargaining agreements represented employees at Fenton Park in two separate bargaining units, an LPN unit and a Service unit which until the end of 1994, included nursing assistants, physical therapy and rehabilitation aides, and dietary employees. The collective-bargaining relationship at Fenton Park had been continued while the facility was being operated by the court appointed receiver, Greenhurst had been a nonunion facility.

Although the acquisition of the two facilities was not finalized until January 1, 1995, in anticipation of its forthcoming takeover of the facilities the Respondent had hired individuals with the intention of placing them at the newly acquired facilities as soon as the Respondent took control of them. These individuals were initially placed on the Heritage Village payroll and trained at Heritage Village for these future jobs at Fenton Park and Greenhurst. There were 24 such individuals hired by the Respondent including the future administrator of Heritage Green, Dennis Beckmann, and moved to Heritage Park and Heritage Green in keeping with this plan.

The Respondent also distributed employment applications to Fenton Park employees in the fall of 1994 so that there would be no lack of continuity in the care of residents at Fenton Park when the Respondent assumed control of the facility. The evidence shows that the Respondent hired as a majority of its initial work force at Heritage Park, individuals who had been represented by the Union at Fenton Park. The Respondent also retained the administrator of the Fenton Park facility, Jerome Krull, as administrator of Heritage Park and promoted the assistant director of nursing at Fenton Park, Beverly Arvidsen, to the director of nursing position at Heritage Park.

The General Counsel's witness, LPN Veronica McClaren, testified that she worked as a med nurse at Fenton Park and was hired by the Respondent to hold the same position at Heritage Park. She stated that her duties remained basically unchanged after January 1, 1995. She was never asked by the Respondent to work at any other facility, required to wear a Heritage Park identification tag as were other employees, and only on a few occasions did she observe an employee with a Heritage Green or Heritage Village tag working at Heritage Park. McClaren related that in-service training was conducted for Heritage Park employees at Heritage Park by Ken Sutherland, in-service coordinator at Heritage Park, as well as infection control officer for Heritage Park.

On January 5, 1995, by letter, Union Business Agent Ron Lucas requested that the Respondent recognize the Union as the collective-bargaining representative of the employees in the LPN unit and Service unit that it had represented at Fenton Park. By letter dated January 11, 1995, the Respondent refused to recognize the Union as its employees collective-bargaining representative for the stated reason that the former Fenton Park operation had been integrated with the Respondent's operations at the former Greenhurst facility, now called Heritage Green, and the Heritage Retirement Campus, Heritage Village Health Care Center and Fenton Park, and renamed Heritage Park Health Care Center (Heritage Park) as to make a single facility bargaining unit no longer appropriate.

After acquiring the assets of Fenton Park and Greenhurst on January 1, 1995, the Respondent hired 31 LPNs, 63 CNAs, and 14 unit attendants from Fenton Park. No physical therapy aides were hired from Fenton Park. The three facilities are located within a 6-mile triangle with Heritage Village

[2] In order for this transaction to take place the Respondent had to secure by December 31, 1994, Certificates of Need from New York State, which it did. Moreover, according to the testimony of the Respondent's witnesses, the Respondent's board of directors (21 members nominated by 10 Free Methodist Conferences) determined to operate those facilities as one operation.

on Route 60 in Gerry and Heritage Park on Route 60 in Jamestown. Heritage Green is located 6 miles from each facility

The Respondent's witnesses testified that Gerry Homes, since its acquisition of the assets of Fenton Park and Greenhurst sought to run a highly functionally integrated operation with all departments and functions controlled by corporate staff at Gerry Homes. Labor relations is administered by the Gerry Homes' personnel coordinator with identical policies and procedures, including a common employee handbook, and identical benefits for vacation, sick time, insurance benefits, and pension benefits for all employees. Wages are established by department heads in conjunction with the personnel departments in each facility with the wage scales approved by the administrator and staffing levels are determined by the administrators and Donald Cutler, the president of the Respondent.

Mary Lou Clark testified that she had been the admissions administrator and director of social work for nursing home operations. As such she did all the preadmission workup for all the facilities, used common advertising materials, identical forms, etc., and was responsible for assuring that all social workers were completing their work as required by New York State.[3]

John Price is in charge of all computer systems for Gerry Homes, which is the same for all facilities and the Respondent utilizes the same telephone and other systems in its operations. Mike Price is the Gerry Homes chief financial officer. The Gerry Homes has an integrated financial system that accounts for the finances of each home separately, as required by New York State regulations. Kathy Fullum is the residential and systems quality coordinator and is responsible for maintaining the quality of nursing services at all three facilities as well as patient care requirements.

Donald Cutler, the Respndent's president, testified that Gerry homes uses the assigned/attached supervisor model of management. Each employee has an assigned supervisor who is responsible for his or her hiring and firing, rate of pay, hours of work, and other terms and conditions of employment, and an attached supervisor who directs his or her work and ensures that the work is performed up to the Gerry Home's standards. The corporate department heads are the attached supervisors for the senior employees in their area of control and are responsible for that level of work performance. Although the facilities are separately licensed pursuant to New York law, the Respondent maintains that it has centralized all nursing, maintenance, social services, marketing, systems, quality control, educational programs, human resources, budgeting, finances, accounting, materials, and payroll.

An employee handbook is used at all the facilities and governs the terms and conditions of employment for all employees at the Gerry Homes. These policies and employee benefits are the same for all employees including vacation, sick leave, insurance benefits, and pension benefits. Gerry Homes has also adopted a standardized wage plan.

Regarding employee interchange, the Respondent asserts that on January 1, 1995, it transferred 24 employees from its Heritage Village facility to Heritage Park and Heritage Green. Among those transferees were the management team for Heritage Green and various supervisory personnel for Heritage Park. Since the Respondent has owned Heritage Park and Heritage Green, approximately 60 employees have been permanately transferred between the facilities including bargaining unit employees and management and corporate staff. Temporary tranfers are effected on an as-needed basis. The record evidence shows temporary transfers of 361 persons between the Gerry Homes facilities. However, there is little evidence of employee contact among the facilities in the record.

General employee orientation sessions are conducted at one facility for all new hires and each facility does its own facility-specific orientation, thereafter. The Respondent has a unified job posting system for the entire organization with all nonentry level jobs posted at each facility. Gerry Homes used a common offer letter for job applicants who could designate their choice of facility to work at and hiring is done at all locations for all locations. The job designations and job skills are identical at each of the Gerry Homes' facilities.

B. *Analysis and Conclusions*

An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a ''substantial and representative complement,'' in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a ''substantial continuity between the enterprises.'' *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 290 fn. 4 (1972). Also see *Task Force Security & Investigation*, 312 NLRB 412 (1993).

The Supreme Court in *Fall River*, supra at 43, summarized the factors relevant to determining continuity as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.

The Court further instructed that these characteristics of the substantial continuity factor were to be assessed primarily from the perspective of the involved employees, that is, whether ''those employees who have been retained will . . . view their job situations as essentially unaltered.'' Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).[4] Further, although each factor must be analyzed separately, they must not be viewed in isolation and ultimately, it is the totality of the circumstances which is determinative. See *Fall River*, supra.

Moreover, as recognized in *NLRB v. Burns Security Services*, supra, successorship may depend upon the continued appropriateness of the bargaining unit. As stated by the Supreme Court in *Burns*, supra at 280:

[3] At the time of the hearing Clark had resigned her position which was discontinued, with Donald Cutler, the Respondent's president, assuming these duties.

[4] Also see *Nephi Rubber Products Corp. v. NLRB*, 976 F.2d 1361 (10th Cir. 1992).

> It would be a wholly different case if [the successor's] operational structures and practices [were so different that the existing] bargaining unit was no longer an appropriate one.

In construing this provision, the Board has held that in ''all of the Board cases in which successorship was found are predicted on the finding that the predecessor's bargaining unit remained intact under the successor and continued to be an appropriate unit. . . . A determination must therefore be made as to the integrity of the [predecessor] bargaining unit after the transfer . . . . *Border Steel Rolling Mills*, 204 NLRB 814, 821 (1974). While the Board has held subsequent to *Burns*, supra, that employees acquired from a predecessor ''themselves must constitute an appropriate unit,'' *Irwin Industries*, 304 NLRB 78 (1991), the Board however, has also held that the Act does not require an evidently only, ultimately or most appropriate unit, but only that it be at least appropriate in nature. *Vincent M. Ippolito, Inc.*, 313 NLRB 715 (1994); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950).

The General Counsel in his brief asserts:

> When Respondent acquired the former Fenton Park facility and, without interruption, commenced operating that facility as Heritage Park, with a majority of its employees having been hired from among the former bargaining unit employees at Fenton Park, Respondent became a successor employer to Fenton Park. Respondent does not dispute its status as a successor. Rather, Respondent contends that it merged operations of Fenton Park with Respondents' other facilities and, thus, the appropriate bargaining unit became a multi-facility unit as to which a majority of the employees were not former employers of Fenton Park.

The General Counsel concedes however, that the successor bargaining obligation of the Respondent would not exist for a unit other than the preexisting single-facility unit.

However, the Respondent in its brief asserts that while the General Counsel bases the Respondent's violation of the Acts on the ''premise that the Gerry Homes is a successor employer to the Bargaining Unit employees at the former Fenton Park Nursing Home (Fenton Park),'' the fact that when the Respondent acquired the assets of Fenton Park and hired, via direct application process, a majority of the employees in the Bargaining Units at the facility, this ''does not fulfill the successorship test. The dispositive issue in the case is whether the Bargaining Units remained appropriate after the Gerry Homes' acquisition of the assets of Fenton Park and Greenhurst, another nursing home, on January 1, 1995.''

In the health care industry, the Board applies a rebuttable presumption that single-facility units are appropriate. *Manor Health Care Corp.*, 285 NLRB 224 (1987). That presumption, however, may be rebutted by demonstrating ''functional integration so substantial as to negate the separate identity of the single-facility unit. *Sol's*, 272 NLRB 621 (1984). In determining whether the presumption has been rebutted, the Board considers whether there is central control over daily operations and labor relations, including the extent of local autonomy; similarity of employee skills, functions, and working conditions; degree of employee interchange; common supervision, distance between locations; and bargaining history. *Passavant Retirement & Health Center*, 313 NLRB 1216 (1994); *Sol's*, supra.

The facts herein establish that Heritage Park is operated as a separate facility, as required by New York State law. Heritage Park has its own administrator, its own director of nursing, and a separate accounting system from the Respondent's other facilities. The fact that New York State law requires this separation is irrelevant. However, the Respondent asserts that the three facilities are functionally integrated and it did produce some evidence of this. Specifically, Donald Cutler as president of the Respondent has overall responsibility for operation of all the Respondent's facilities, including Heritage Park, there is a central environmental service director, a common personnel director, and a common director admissions who also coordinates social services at each facility. Personnel policies are the same at all facilities as established in a handbook in effect at all of the Respondent's facilities. There is also some common purchasing of supplies by the Respondent for its facilities. However, such evidence of functional integration is far outweighed by the significant independence possessed by management at Heritage Park. Heritage Park has its own separate personnel department which handles the hiring, firing, and disciplining of employees at the facility. Wages for employees are set by Heritage Park department heads with the approval of the administrator at Heritage Park. The administrator may set staffing levels at the facility in conjunction with Cutler. See for example, *Manor Health Care*, supra (whose administrators were responsible for hiring and firing of employees as well as grievance adjustment); cf. *West Jersey Health Systems*, 293 NLRB 749 (1989). Notwithstanding testimony offered by the Respondents' witnesses concerning its ''assigned/attached supervisor model of management,'' the doctrine of substance over form shows significant independence possessed by management at the three facilities with regard to the day-to-day operations with no commonality of day-to-day supervision between the facilities. Contrast, *Mercy Health Services*, 311 NLRB 367 (1993); *Presbyterian/St. Lukes' Medical Center*, 289 NLRB 249 (1989).

The Respondent introduced evidence of employee transfers and asserts that such interchange further establishes that there is not an appropriate single-facility unit, herein. However, a review of this evidence shows that of the permanent transfers most were actually hired with the specific intention that they would work at Heritage Park or Heritage Green and were merely trained at Heritage Village because acquisition of the other two facilities had not yet become effective. Most of the remainder of these permanent tranfers were managerial people receiving promotions or new duties. Most temporary transfers occurred during the first 6 months of the facility's operation when the facility was short staffed and involved management personnel from Heritage Village who assisted in the transition period when the Respondent took control of the facility. Moreover, many of the early temporary transfers were involved in the short lived ambassador program designed to orient Heritage Village employees to the corporate policies of the Respondent. Additionally, whenever employees of another of the Respondent's facilities works at Heritage Park, Heritage Park is billed for their services by the other facility but this may be due to the requirement by New York State for each facility to maintain separate records.

From all of the above, I find and conclude that the Respondent has failed to meet it's burden of showing that the Fenton Park facility has been so integrated into the Respondents' other facilities as to negate the separate identity of the single-facility unit. The terms and conditions of employment of Heritage Park's employees are clearly controlled by Heritage Park management with broad guidelines established by the Respondent, many of which are common to all nursing homes under New York State law. There is little evidence of employee contact among the facilities on a daily or even weekly basis and I credit the General Counsel's witness McClaren as to the lack of substantial interchange of employees between the facilities. Her testimony was given in a believable and forthright manner. Moreover, the Board considers the degree of interchange and separate supervision of particular importance in determining whether the presumption of it's single-facility unit has been rebutted. *Passavant Retirement & Health Center*, supra.

The Respondent also asserts that the ''Units Sought by the General Counsel are Inappropriate as Such Units Increase Unit Proliferation in a Health Care Setting—a Result Inherently Inappropriate Under Congress' Antl-Proliferation Policy.'' However, as above, the Respondent failed to rebut the presumption that the unit sought is inappropriate in composition and scope under Congressional antiproliferation policy.

Also there is no evidence herein of any potential adverse consequences that would result from a labor dispute at a single-facility unit so as to negate the finding of such a unit out of concern for the disruption of health services for Respondents' residents. *Children's Hospital of San Francisco*, 312 NLRB 920 (1993). Moreover, the prior bargaining history at the single facility, now known as Heritage Park, would justify a finding that a single-facility unit is appropriate, herein. *Children's Hospital of San Francisco*, supra.[5]

In *O'Brien Memorial*, 308 NLRB 553 (1992), the Board affirmed the Regional Director's Decision and Direction of Election (Case 8–RC–14734) which stated in part:

> In *Manor Healthcare Corp.*, supra, the Board made clear that even where several facilities are physically close together and operated under administrative centralization, with uniform policies for all employees, this would not suffice to refute the single facility unit presumption in the health care field. *Manor Healthcare Corp.*, supra and *Mercywood Health Building*, 287 NLRB 1114, 1116 (1988), establish that there must [be] substantial evidence of regular contact and interchange between the employees of different facilities for a Petitioner's desire for a single-facility unit to be rejected.

As in *O'Brien Memorial*, supra, I do not find this to be the case in the instant matter. the substantial evidence of regular contact and interchange between the employees of the different facilities, herein.

Based on the foregoing and the record as a whole, I find that the Respondent has failed to rebut the presumption that the single-facility unit sought by the Union is an appropriate unit.

Having found that the Respondent has failed to rebut the presumption favoring a single-facility unit and therefore the appropriateness of the unit requested by the Union, l also find that the Respondent is a successor employer. In the instant case the record establishes that when the Respondent acquired the former Fenton Park and, without interruption, commenced operating the facility as Heritage Park, with a majority of its employees having been hired from among the former bargaining unit employees at Fenton Park, the Respondent became a successor employer to Fenton Park. *NLRB v. Burns Security Services*, supra. The business' of both predecessor and successor employer is essentially the same (nursing home); the employees of the successor employer are doing the same jobs in the same working conditions under the same supervisors, and the successor and predecessor employers had substantially similar operations processes, and those employees who had been retained would understandably view there job situations as essentially unaltered under these conditions. *Fall River Dyeing Corp. v. NLRB*, supra.

Having found that the Respondent is a successor employer and that the bargaining units described in the amended complaint are appropriate and continued to be so for purposes of collective bargaining, the Respondent was thereby under an obligation to continue to recognize and bargain with the Union as the bargaining representative of the LPN unit and Service unit at Heritage Park Health Center. Therefore, when the Respondent failed and refused to recognize and bargain with the Union subsequent to the Respondent's letter of January 11, 1995, the Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act, *Children's Hospital of San Francisco*, 312 NLRB 920, supra; *Manor Healthcare Corp.*, supra.; *Passevant Retirement & Health Center*, supra.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occuring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, l shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has refused to meet and bargain with the Union violation of Section 8(a)(1) and (5) of the Act with regard to the LPN Unit and the Service Unit, it will be ordered to cease and desist therefrom and, on request, to bargain collectively in good faith with the Union as the exclusive representative of all the employees in the appropriate units, and in the event an understanding is reached, to embody such understanding in a signed agreement. See *Winn-Dixie Stores*, 243 NLRB 972 (1979). In addition, the Respondent shall maintain in effect the terms and conditions

[5] Even without reliance on bargaining history a single-facility unit might be appropriate where other significant factors are present like lack of significant interchange of employees between facilities, and lack of separate supervision at the facilities on a day-to-day basis, etc.

of employment specified in the now-expired collective-bargaining agreement regarding the above appropriate bargaining units unless and until the Respondent and the Union agree otherwise, or until the parties bargain to a legitimate impasse.

Since the amended complaint does not allege any unilateral changes after the Respondent's refusal to recognize and bargain with the Union, the issue was not litigated, and no unilateral change finding was made by me, and I therefore provide no make-whole relief as part of this remedy. *Davies Medical Center*, 303 NLRB 195 (1991).

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post a customary notice.

CONCLUSIONS OF LAW

1. Gerry Homes d/b/a Heritage Park Health Care Center is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. Gerry Homes d/b/a Heritage Park Health Care Center is a successor to Fenton Park Nursing Home.

3. International Brotherhood of Teamsters Local Union No. 649, now known as Local Union No. 264 is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of the Respondent (the LPN unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses employed by the Respondent at its Heritage Park facility located at 150 Prather Avenue, Jamestown, New York, excluding all office clerical employees, professional employees, registered nurses, service and maintenance employees, housekeeping aides, laundry aides, dietary employees, nursing assistants, social workers, activities director, dietitian, director of social work, inservice director and all guards and supervisors as defined in the Act.

5. The following employees of the Respondent (the Service Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service employees employed by the Respondent at its 150 Prather Avenue, Jamestown, New York location, including nursing assistants and physical therapy and rehab aides; excluding registered nurses, licenced practical nurses, dietary technicians, accredited records technicians, social workers, activities director, dietitian, director of socilal work, inservice director, office clerical employees, and other professional or technical employees, guards and supervisors as defined in the Act.

6. At all times material, and since January 1, 1995, the Union[6] has been, and is now, the exclusive bargaining representative of all the employees in the appropriate units set forth above, for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

7. On January 11, 1995, by failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the units found appropriate above, the Respondent violated Section 8(a)(1) and (5) of the Act.

8. The aforesaid unfair labor practices affects commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

---

[6] See fn. 1, supra.